SUPREME COURT, U.S.
FILED
FEB 18
F. ROBERT KAUFER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 448

ANDREW KYRIACO, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *et al.*, *Respondents*.

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

I. The Summonses in This Case, Even if Good Under Donaldson When Issued, Are Now Unenforceable Because Criminal Prosecutions Are Currently Pending Against Petitioners

In *Donaldson* v. *United States*, No. 65, this Term, decided January 25, 1971, this Court held that "under § 7602 an internal revenue summons may be *issued* in aid of an investigation if it is *issued* in good faith and prior to a recommendation for criminal prosecution." (Slip op. p. 19. Emphasis added.) The Court's opinion indicated that the Revenue Service could not use a summons *issued after* a recommendation for prose-

cution. It left open the question whether a summons *issued before* a recommendation for prosecution could legitimately be *enforced after* such recommendation.

This case presents the question left undecided in *Donaldson*. Between the issuance of the summonses in question in this case and the present time, a criminal prosecution has been commenced against two of the petitioners.* Only a court order can require these petitioners to turn over the information which is sought. Yet, by the Government's own admission, that information is to be used by the Department of Justice to aid a pending criminal prosecution. Supp. Mem. p. 3.

Enforcement of the instant summonses would constitute an abuse of both administrative and judicial process, an abuse clearly inconsistent with *Donaldson* and the Court's earlier decision in *United States* v. *Powell*, 379 U.S. 48, 58 (1964). In *United States* v. *Mousey*, 70-2 USTC ¶ 9578 (1970), the Seventh Circuit adopted this view in ruling that intervening events, particularly the commencement of a criminal prosecution, are relevant to whether a summons, proper when issued, may properly be enforced. As the Court of Appeals stated, "enforcement would be equally objection-

* As the Court recognized in *Donaldson*, and as the Government concedes (Brief, *Donaldson* v. *United States*, p. 36), a criminal prosecution begins when the IRS recommends a case to the Department of Justice for criminal prosecution. On December 4, 1970, the Internal Revenue Service recommended to the Justice Department that it commence criminal prosecution against two of the petitioners in the instant case. This was to be expected. As the District Court pointed out, from the very start this was an "investigation where tax liability is to be determined only as a necessity to a prosecutable criminal case" (App. 13a.), "not the 'continuing investigation' of tax liability referred to in *Boren* v. *Tucker*, 239 F. 2d 767, 9th Cir. 1956." (App. 12a-13a.)

able where the judicial action would itself effect an abuse of the summons." The *Monsey view* that a properly issued summons may not later be enforced if there has been an intervening criminal prosecution is merely a particularized application of this Court's ruling in *Powell*, that "it is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused."* 379 U.S. at 58.

It would be legalistic in the extreme to contend, with the Government, that a summons good when issued may be enforced notwithstanding an intervening criminal prosecution. The question is not how or when a summons may be issued, but whether the sensitive tool of compulsory administrative process may be used in aid of a criminal prosecution. In *Donaldson*, the Government conceded that "the administrative summons procedure can no longer be used" once a case has been recommended to the Department of Justice for prosecution. Government Brief, p. 36. The heart of the administrative summons procedure is not the *issuance*

* *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12, 16 (2d Cir. 1962), *cert. denied* 373 U.S. 902 (1963), is in conflict with *Monsey*, but it was decided before this Court had clarified the limits on the IRS investigative powers in *Reisman* v. *Caplin*, 375 U.S. 440 (1964), and *United States* v. *Powell*, 379 U.S. 48 (1964). Subsequent cases have cast doubt on *Magnus*. See *Venn* v. *United States*, 400 F.2d 207, 210 and n.6 (5th Cir. 1968). The Government also relies on *United States* v. *Moriarty*, 71-1 USTC ¶ 9125 (7th Cir. 1971), but that decision specifically distinguished the case before it from one in which "the summons was admittedly issued to aid the Department of Justice" in a criminal prosecution. As noted in the text, there is no meaningful distinction between obtaining information by issuing a summons or by enforcing one, and, since the civil aspects of the present case are in abeyance, the only imminent use to which the information would be put is in the pending criminal prosecution.

of a summons but the *obtaining* of summoned documents or testimony by compulsory process. Clearly, the teaching of *Donaldson* is that it is improper for such compulsory process to be used—whether by *issuance* or *enforcement* of a summons—once a criminal prosecution has commenced.

Finally, it should be emphasized that there are no practical considerations of any import which might require a result adverse to petitioners. Litigious delay in complying with summonses is unlikely after *Donaldson*. Further, the Government will invariably transfer arguably meritorious cases to the Justice Department for criminal prosecution if there is substantial danger that applicable statutes of limitations have placed the case in jeopardy. Supp. Mem. p. 2. And, now that the case has been placed in the hands of the Justice Department, the Revenue Service has no present need for the records sought, for civil aspects of a tax investigation are held in abeyance during the pendency of a criminal prosecution. See Petition, p. 17, n.16.

An administrative agency should not act as cat's-paw for criminal law enforcement agencies. In *Abel* v. *United States*, 362 U.S. 217, 226 (1960), this Court specifically condemned "the deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case. . . ." Permitting enforcement of the summonses in this case can amount to nothing else.

For the foregoing reasons, the Court should grant a writ of certiorari to consider whether the summonses in question may now be enforced.

II. The Fourth Amendment Objection Presented in This Case Was Not Decided in Donaldson and Requires That the Decision Below Be Reversed

In *Donaldson* this Court spoke as follows:

> Despite the contrary intimations in the motions to intervene, there is now no constitutional issue in the case. The taxpayer on oral argument so conceded. In any event, that question appears to have been settled long ago when the Court upheld, against Fourth Amendment challenge, an internal revenue summons issued under the Revenue Act of 1921 and directed to a third-party bank. *First Nat'l Bank* v. *United States*, 267 U.S. 576 (1925), affirming 295 F. 142, 143 (SD Ala. 1924). See also *United States* v. *First Nat'l Bank*, 274 F. Supp. 283, 284 (ED Ky. 1967), aff'd, 390 U.S. 199, and *United States* v. *Shlom*, 420 F.2d 263, 266 (CA 2 1969), *cert. denied*, 397 U.S. 1074.

No constitutional issue was presented or raised in the *Donaldson* case because the taxpayer under investigation there had no proprietary or privilege interest in the bank records which were sought from third parties. Similarly, no valid Fourth Amendment claim was present in the *First National Bank of Mobile* case, cited in the *Donaldson* opinion, because the bank from which records were sought and which raised the question was not the subject of an investigation, and the taxpayer who was did not object.*

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* Further, the Supreme Court's *per curiam* affirmance of the District Court's decision in *First National Bank of Mobile* was based entirely on the authority of four cases involving grand jury subpoenas duces tecum: *Essgnee Co. of China* v. *United States*, 262 U.S. 151 (1923); *Wheeler* v. *United States*, 226 U.S. 478 (1913); *Wilson* v. *United States*, 221 U.S. 361 (1911); *Hale* v. *Henkel*, 201 U.S. 43 (1906).

The *First National Bank of Pikeville* decision, also cited in the

Unlike the taxpayer in *Donaldson*, as the Court emphasized, (Slip op., pp. 5-6), petitioners here are both the taxpayers under investigation and the owners of the books and records sought by the Internal Revenue Service. In these circumstances, it seems clear that the summonses in issue in this case are being used in violation of the Fourth Amendment. See Petition at pp. 17-21. In particular, under *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and *See* v. *City of Seattle*, 387 U.S. 541 (1967), reaffirmed this year in *Wyman* v. *James*, —— U.S. ——, 39 L.W. 4085, 4090 (1971), it is clear that mere administrative process, utilized without proof of probable cause or review by an independent magistrate, cannot constitutionally be employed when the investigation has become criminal in nature, has focused on a particular individual, and has come under the supervision and control of the Department of Justice.

The *Donaldson* opinion made it clear that the *statute* authorizes the use of an IRS summons in an investigation which has criminal as well as civil overtones, "if it is issued in good faith and prior to a recommendation for criminal prosecution." (Slip op. p. 19.) *Donaldson* did not resolve the *constitutional* question whether a taxpayer who is the subject of an investigation which is principally criminal may resist a section

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Donaldson opinion, did not involve the Fourth Amendment issue presented here. Petition, p. 19, n.23. Further, although this Court declined review in *United States* v. *Shlom*, 420 F.2d 263 (1969), *cert. denied* 397 U.S. 1074 (1970), it also declined review in *Hinchcliff* v. *Clarke*, 371 F.2d 697 (6th Cir.), *cert. denied* 387 U.S. 941 (1967), where the Court of Appeals affirmed the use of a section 7602 summons over constitutional objection only on condition that the Government make no criminal use of the information obtained.

7602 summons issued in order to obtain *his* books and records.

That issue, squarely presented in this case, involves balancing the Government's need for relevant information against essential constitutional rights. It is fully possible, however, to protect the Fourth Amendment rights of taxpayers without stultifying the enforcement of federal law, for there are alternative, well-established means by which the Revenue Service can obtain information.* This fundamental Fourth Amendment issue, not resolved in *Donaldson*, will continue to be raised until resolved by this Court.**

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and set this case for oral argument.

Respectfully submitted,

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* Under 26 U.S.C. § 7608, Revenue Service agents are empowered to, and do, use search warrants. *E.g., United States* v. *Premises, 801 North Seventh Street*, 70-1 USTC ¶ 9412 (S.D. Ill. 1970). Grand jury subpoenas also can be used where crime is suspected.

** *E.g., Held* v. *United States*, No. 1306, October Term, 1970, Petition, p. 3.